IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, et al.,
Petitioners and Intervening
Defendants Below,

vs.

GRANVILLE H. LANCE, et. al.,
Respondents and Plaintiffs Below,

and

THE BOARD OF EDUCATION OF THE COUNTY OF ROANE,
a Corporation, et al.,
Respondents and Defendants Below.

BRIEF

Of Chas. Claflin Allen as Amicus Curiae

STATEMENT

This amicus curiae is a practicing lawyer in St. Louis and St. Louis County for a number of years and has been concerned with the issuance and collection of bonds of counties, cities, school districts and other districts. There is now pending in the District Court in the City of St.

Louis a case entitled, **Preisler v. Mayor of the City of St. Louis** and two companion cases consolidated with it, attacking the requirement of the Constitution and Statutes of Missouri of a two-thirds majority vote to approve bond issues and to approve school taxes in excess of the constitutional rate. This amicus has been appointed by the District Court as amicus curiae in those cases. That court has stayed its decision pending a decision in this case.

The briefs of the petitioners for the writ of certiorari in the case at bar and of amici curiae from California, have fully discussed the principles involved in this case, which it is not necessary for this amicus to repeat. This brief will make only one point dealing with the inapplicability of the Equal Protection Clause in cases where the public policy of the state is involved and will briefly give the history of the difficulties in Missouri which gave rise to the two-thirds vote requirement, and which show that policy.

POINTS AND AUTHORITIES

Point I

The Fourteenth Amendment Does Not Apply to an Important Public Policy of the State Which Has a Rational Relationship to a Legitimate State End.

McDonald v. Board of Election Commissioners, 394 U. S. 802.

Point II

The Constitution of Missouri Requires the Consent of at Least ⅔ of the Voters Voting at an Election Prior to the Issue of Bonds of Counties, Cities, School Districts and Other Political Corporations.

Sec. 26 of Article VI of Annex hereto.

ARGUMENT

This court in the case of **McDonald v. Board of Election Commissioners**, 394 U. S. 802, a case involving an inmate of a jail who was denied by the statute the right to an absentee ballot to vote in an election, in the opinion by Chief Justice Warren, said,

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." (394 U. S., l. c. 808-9.)

The historical background of this Missouri constitutional requirement of a two-thirds majority vote for bond issues is enlightening. Until 1865 there was no constitional provision requiring an election to be held either by the state or by the counties, cities or other political subdivisions prior to the issuance of bonds.

In the 1830's the country entered into an era of railroad building and bond issues for millions of dollars were issued in aid of constructing railroads for which the railroad companies issued their bonds.

By the end of the Civil War many bonds issued to or for the railroads were in default. As a result of these

experiences, the constitution of 1865 by Article XI, Section 13 provided for the first time that the state should not become a stockholder in any private corporation except to secure loans theretofore extended to certain railroad corporations. Section 14 of the same Article also provided that no county, city or town should become a stockholder in or loan its credit to any corporation unless two-thirds of the qualified voters of the county, city or town assented thereto. In 1868 the "Township Aid Act" was passed requiring a two-thirds majority of the voters who voted at the election.

A number of counties, townships and other public corporations issued bonds and delivered them to railroad promoters and they were sold throughout the east to holders in due course. In a number of cases, after selling the bonds, the promoters did not complete the railroad.

In 1873 a severe depression hit the country and litigation arose over the validity of the bonds.

A number of holders of these bonds obtained judgments in the Federal courts against several counties on the ground that the plaintiffs were holders in due course and the bonds contained recitals that all the requirements of law had been complied with although the counties had not gotten the railroad. The only remedy of these judgment creditors was mandamus to compel the county courts to levy taxes to pay the judgments. When such orders were issued the county judges frequently resigned, leaving the county without a county court; some county officials spent time in jail for contempt.

For years these judgments went unpaid; but all were ultimately refunded at a compromise figure by new bonds which were voted by the required two-thirds majority and matured serially over a 20-year period. The last county

to refund its railroad aid judgment was St. Clair County, which issued refunding bonds in 1918 and which were all paid by 1938.

In the meanwhile, the state constitution of 1875 carried forward the requirements of the two-thirds vote. Section 12 of Article X provided that "no county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose; * * * and provided further, that any county, city, town, township, school district or other political corporation or subdivision of the state incurring an indebtedness requiring the consent of the voters as aforesaid shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due and also to constitute a sinking fund for the payment of the principal thereof, within 20 years from the time of constructing the same: . . ."

This constitution also provided limitations on the amount of indebtedness which might be so incurred, based on a percentage of the assessed valuation.

Article VI, Section 26 of the Constitution of 1945 carries forward these provisions requiring a two-thirds vote of the qualified electors voting on the proposition before the political corporation may become indebted in excess of the income and revenue for the year. Section 26(f) requires that before incurring any such indebtedness, provision must be made for the collection of an annual tax in whatever amount is needed, in order to be sufficient to pay the interest and principal within 20 years.

In an opinion by Mr. Justice Field in the case of **Vital Jarrolt v. City of Moberly**, 103 U. S. 580, l. c. 585, this court, speaking of the requirement of the Missouri Constitution of a two-thirds vote for the issuance of bonds, said,

> "The object of the inhibition in the state constitution was to prevent the creation of debts by counties, cities and towns on behalf of any company, association or corporation without the assent of two thirds of their qualified voters. The loan of their credit, that is, the placing of their obligation for the payment of money for the use of companies was the usual mode in which they incurred indebtedness. Aid in this way to companies, particularly such as were organized for the construction of railroads, was given so frequently by municipal bodies in Missouri, before the Constitution of 1865 went into effect, as in many instances to greatly embarrass and subject them to burdensome and oppressive taxation to provide for the interest on their obligations and the ultimate payment of the principal."
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> "Numerous Acts of the Legislature had authorized officers of counties and cities to subscribe for stock in railway companies, and to issue bonds for their aid without limit as to amount and without the previous assent of those who were to be taxed for their payment. In many instances the road, in aid of which the bonds were issued, was never constructed, and as no benefit resulted to the counties and cities, their inhabitants naturally felt impatient under the burdens which their officers had improvidently imposed."

It will thus be seen that the requirement of a two-thirds vote before the issuance of bonds and of tax levies for their payment, without limitation as to rate, has been part of the established fiscal policy of the State of

Missouri for 100 years. This policy has resulted in the fact that bonds of cities, counties and school districts in Missouri have enjoyed a high standing in the financial markets of the country with the resulting relatively low interest cost.

The contrary ruling would lead into a morass. For example, Sec. 3 of Article VI of the Missouri Constitution provides that two or more counties may be consolidated by a vote of a majority of the qualified electors voting thereon in each county affected. If the respondents' position in this case should prevail, no two counties could be consolidated unless they happened to have the same population because each vote in the smaller county would have more "weight" than a vote in the larger.

It cannot be said that the requirement of a ⅔ majority has no rational relationship to a legitimate state end.

Respectfully submitted

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ANNEX

THE SUBSTANCE OF THE MISSOURI CONSTITUTIONAL PROVISIONS RELATING TO ELECTIONS AND BOND ISSUES

ARTICLE VI

Section 2. Two or more counties may be consolidated by a vote of a majority of the qualified electors voting thereon in each county affected.

Section 4. No county shall be divided or have any portion stricken therefrom except by vote of a majority of the qualified electors voting thereon in each county affected.

Section 7. A county may be disorganized by vote of two-thirds of the qualified electors of the county voting thereon, and when so dissolved all or portions thereof may be annexed to the adjoining county or counties as provided by law.

Section 8. No county seat shall be removed except by vote of two-thirds of the qualified electors of the county voting thereon at a general election, but no such vote shall be taken more than once in five years.

Section 10(a). No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding the income and revenue provided for such year, except as otherwise provided in this constitution.

Section 10(b). Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by a vote of two-thirds of the qualified voters thereof voting thereon, may become indebted in an amount not to exceed 5% of the value of taxable tangible property therein as shown

Missouri for 100 years. This policy has resulted in the fact that bonds of cities, counties and school districts in Missouri have enjoyed a high standing in the investment markets of the country with the resulting extremely low interest cost.

The contrary ruling would lead into confusion. Briefly, Sec. 3 of Article VI of the Missouri Constitution provides that two or more counties may be consolidated by a vote of a majority of the qualified voters voting thereon in each county affected. If the respondents' action in this case should prevail, no two counties could be consolidated unless that happened to have the same population because each vote in the smaller county would have more "weight" than a vote in the larger.

It cannot be said that the requirement of a majority has no rational relationship to a legitimate state end.

Respectfully submitted

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ANNEX

THE SUBSTANCE OF THE MISSOURI CONSTITUTIONAL PROVISIONS RELATING TO ELECTIONS AND BOND ISSUES

ARTICLE VI

Section 3. Two or more counties may be consolidated by a vote of a majority of the qualified electors voting thereon in each county affected.

Section 4. No county shall be divided or have any portion stricken therefrom except by vote of a majority of the qualified electors voting thereon in each county affected.

Section 5. A county may be dissolved by vote of two-thirds of the qualified electors of the county voting thereon, and when so dissolved all or portions thereof may be annexed to the adjoining county or counties as provided by law.

Section 6. No county seat shall be removed except by vote of two-thirds of the qualified electors of the county voting thereon at a general election, but no such vote shall be taken more than once in five years.

Section 26(a). No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding the income and revenue provided for such year, except as otherwise provided in this constitution.

Section 26(b). Any county, city, incorporated town or village or other political corporation or subdivision of this state, by a vote of two-thirds of the qualified voters, voting
may become indebted in an amount not to exceed 5% of the value of taxable tangible property therein as shown

by the last completed assessment for state or county purposes except that a school district by a two-thirds vote of the qualified electors voting thereon may become indebted in an amount not to exceed 10% of such value.

Section 26(c). Any county or city by vote of two-thirds of the qualified electors voting thereon may incur an additional indebtedness for county or city purposes not to exceed 5% of the taxable tangible property shown as provided in Section 26(b).

Section 26(d). Any city by a two-thirds vote of the qualified electors voting thereon, may become indebted not exceeding in the aggregate an additional 10% of the value of the taxable tangible property shown as provided in Section 26(b) for the purpose of acquiring rights of way, constructing, extending and improving the streets and avenues and acquiring rights of way, constructing, extending and improving sanitary or storm sewer systems. This section further authorizes the governing body of the city to provide that all or any part of the cost of such improvement may be levied or assessed on the property benefited by the improvement and the proceeds shall be used to reimburse the city for the amount paid or to be paid by it on the bonds issued for the improvement.

Section 26(e). Any city by a vote of two-thirds of the qualified electors voting thereon may incur an indebtedness in an amount not to exceed an additional 10% of the value of the taxable property shown as provided in Section 26(b) for the purpose of paying the cost of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city, provided the total general obligation indebtedness of the city shall not exceed 20%.

Section 26(f). Before incurring any indebtedness every city, town, village, school district or other political cor-

poration or subdivision of the state shall provide for the collection of an annual tax on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as they fall due and to retire the same within 20 years.

Section 27. Any city, town or village by a vote of 4/7ths of the qualified electors voting thereon may issue negotiable interest bearing revenue bonds for the purchase of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the city, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived from the operation of such utility.